TESTIMONY

OF

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ON BEHALF OF

THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY,

AND HUMAN RESOURCES

OF THE

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

REGARDING

"LEGAL AND PRACTICAL ISSUES RELATED TO THE

FAITH-BASED INITIATIVE"

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Introduction

Thank you, Mr. Chairman, Ranking Member Cummings and members of the subcommittee, for this opportunity to speak to you about an issue that has such a profound impact on religious liberty in our country.

I am K. Hollyn Hollman, general counsel for the Baptist Joint Committee on Public Affairs. I am a member of the Tennessee, District of Columbia and United States Supreme Court bars. The Baptist Joint Committee is an education and advocacy organization that serves fourteen Baptist bodies to promote the historic Baptist commitment to religious liberty. Our mission is to defend and extend God-given religious liberty for all, bringing a uniquely Baptist witness to the principle that religion must be freely exercised, neither advanced nor inhibited by government. For nearly 70 years, the BJC has worked to protect religious liberty.

Since 1995, we have been actively monitoring "charitable choice" and related legislative and administrative proposals concerning the funding of religious institutions. As stated in a Baptist Joint Committee resolution adopted on October 8, 1996:

> From the founding of our country, Baptists have opposed the use of tax dollars to advance religion. Baptists believe that, when the government funds religion, it violates the conscience of taxpayers who rightfully expect the government to remain neutral in religious matters. Knowing that the government always seeks to control what it funds, Baptists have long rejected government's handouts for their religious activities. Government subsidization of religion diminishes religion's historic independence and integrity. When the government advances religion in this way, it inevitably becomes entangled with religious practice, divides citizens along religious lines and prefers some religions over others.[1]

These concerns are not trivial, but fundamental, to religious liberty. They stem from our theology, our historical experience and our respect for the constitutional

[1] See attached copy: "Resolution on The Charitable Choice Provision in the New Welfare Act."

standards that have long protected the religious liberty interests of Americans. Unfortunately, the important issues raised by faith-based initiatives continue to be widely misunderstood, and at times purposefully brushed aside.

Most of the Legal and Practical Problems Related to the Faith-Based Initiatives Arise from a Flaw at the Heart of the Proposal

Just days after being sworn in, President George W. Bush issued executive orders creating the White House Office of Faith-based and Community Initiatives and offices in five cabinet departments. Since then the president has expanded the reach and scope of the faith-based initiatives. In the order creating the White House office, the president stated that the administration would actively seek to "enlist, equip, enable, empower and expand" the work of faith-based and community groups. The administration also sought to break down "barriers" that it said prohibited pervasively religious social service providers from receiving government grants for their work. Indeed, barriers should be eliminated. However, much of what the White House calls barriers are really guardrails keeping faith-based, government-funded programs from falling into a constitutional ditch. Instead of focusing on legitimate barriers, we have seen a disregard for legal safeguards, including constitutionally mandated safeguards that have long protected religious liberty by avoiding government funding of religion.

We applaud the president's recognition that religion can play a vital role in addressing society's social problems. We also understand the role nonprofit organizations can play when cooperating with the government to address these problems. There is a fundamental flaw, however, at the heart of "charitable choice" and a great deal of what is being done under the rubric of "faith-based initiatives." These proposals purport to allow

pervasively religious organizations to receive federal funding without altering their religious character[2] and without violating the ban on government funding of religion. These proposals overlook the inherent conflict between allowing religious social service providers that receive government funding to maintain their distinctive character and enforcing the constitutional prohibition against government funding of religious activities, such as religious worship, instruction or proselytization.

While the flaws became more apparent during debates in the U.S. House of Representatives over the Community Solutions Act (H.R. 7) of 2001 and the CARE Act in the Senate, the aggressive pursuit of faith-based initiatives has proceeded in the administrative branch in a way that largely ignores the difficult legal and practical issues presented.

The Initiative Encourages Funding of Religious Entities Without Regard to Current Legal Standards

The legal and practical problems associated with the faith-based initiatives are apparent from a review of the president's December 2002 executive orders and other guidance from the White House. In essence, the president simply bypassed Congress, adopting by executive order many of the most controversial elements of the faith-based plan.

According to the December 2002 executive orders and guidance to faith-based organizations, the only restriction imposed by the Establishment Clause is that government money cannot be used directly for "inherently religious activities." The official White House guidance on this point is remarkably casual: "Don't be put off by

[2] See Executive Order: "Equal Protection of the Laws for Faith-Based and Community Organizations," December 12, 2002, Section 2 (f).

the term 'inherently religious' — it's simply a phrase that has been used by the courts in church-state cases. Basically, it means you cannot use any part of a direct Federal grant to fund religious worship, instruction, or proselytization. Instead, organizations may use government money only to support the non-religious social services they provide."[3]

Two George Washington University law professors, Ira Lupu and Bob Tuttle, have been closely monitoring developments in the faith-based initiatives plan, as part of The Roundtable on Religion and Social Welfare Policy's ongoing project. In their view, the executive orders may exacerbate the ambiguity that remains about the application of the Establishment Clause in this context. They note that the phrase "inherently religious" has never been used by the Supreme Court "to define the boundary of what the government may finance before it runs afoul of the Constitution's Establishment Clause."[4]

While it is correct that government money cannot be used for religious worship, instruction, or proselytization, that description does not capture the full meaning of the Establishment Clause's prohibition of government-funded religion. Unfortunately, the administrative guidance gives the impression that only those listed activities are prohibited.

Following the president's December 2002 directive to federal agencies to implement the executive orders, a series of new regulations have been proposed and implemented that stretch constitutional boundaries. For example, in new regulations from the Department of Labor, the Supreme Court's decision in *Zelman v. Simmons Harris*,

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[3] See "Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government," December 2002, p. 6.
[4] See Pew Charitable Trusts Press Release, "Roundtable Legal Analysis: President's Faith-Based Orders and Proposed Agency Rule Changes Raise Legal Questions," Jan. 9, 2003.

536 U.S. 639 (2002), is used to support a broad assertion that religious organizations that engage in inherently religious activities may receive federal funds through voucher programs. In fact, it is unclear whether the recent Supreme Court decision upholding the Cleveland voucher program would apply to federal social service programs. The Court in *Zelman* found certain constitutional requirements that must be met to find a voucher program constitutional. Such requirements are not mentioned in the new regulations.

According to the Supreme Court in *Zelman*, among the requirements for constitutionality are that the voucher program must be completely neutral with respect to religion, use of vouchers at a religious institution must be based upon a wholly genuine and independent private choice, the vouchers must pass directly through the hands of the beneficiaries, the voucher program must not provide incentives to choose a religious institution over a non-religious one, the program must provide genuine, legitimate secular options, and there must be a secular purpose for the program. *Id.* Of particular importance to the Court in *Zelman* were the choices of secular alternatives (private, non-religious schools and the public schools) for the voucher beneficiaries. New administrative regulations lack any mention of requirements to provide a secular alternative and fail to provide notice to beneficiaries about their constitutional rights.

Employment Provisions Are Not Supported by Current Law and Create Dangerous Risk of Government-Funded Discrimination

One of the most problematic legal issues related to the faith-based initiatives is the employment provision, which purports to allow religious discrimination in government-funded positions. While we support Title VII's religious organization exemption as it has traditionally applied to privately funded positions, we do not support

extending that exemption to tax-supported positions. When applied to privately funded activities and enterprises, it appropriately protects the church's autonomy and its ability to perform its mission. When extended in the context of the faith-based initiatives, however, the exemption improperly advances one important policy goal, autonomy for religious organizations, over another, nondiscrimination in federally funded job positions.

In the administration's attempts to defend its faith-based policy, it fails to acknowledge any tension between the nation's commitment to equal employment opportunity and the autonomy of religious organizations. Why prize the latter exclusively if the real goal is to provide social services? This legal conflict has been a major subject of debate and one of the main reasons the faith-based legislation failed. The statutory exemption does not mention, nor does the legislative history indicate, that the drafters contemplated the context to which the exemption is now being applied.

Proponents of allowing religious organizations to discriminate even when operating as federally funded programs cite the breadth of the exemption to argue that it should apply even in government-funded positions. Yet, case law does not support the sweeping policy being pursued. It is true that courts have interpreted the exemption not only to apply to clergy, but also to all of the religious organization's employees including support staff, and not only to religious affiliations, but also to religious beliefs and practices, as the United States Supreme Court ruled in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

The *Amos* case, however, did not involve a religious organization that was receiving federal funding. In fact, the only federal court that has decided the constitutionality of retaining the Title VII exemption after receipt of direct federal funds

denied the exemption. *Dodge v. Salvation Army*, 1989 WL 53857 (S.D. Miss. 1989). In *Dodge*, the court held that the religious employer's claim of its Title VII exemption for a position "substantially, if not exclusively" funded with government money was unconstitutional because it had "a primary effect of advancing religion and creating excessive government entanglement." *Id*. The analysis applied by the court in *Dodge* should apply with equal force to all federal programs that would provide direct federal funds to religious organizations.

We oppose efforts through executive orders and otherwise to permit religious discrimination in hiring in government-funded projects. It really boils down to this: Does the grant recipient intend to promote religion in a government-funded program? If so, it should not accept tax money. If not, there is no justification for religious discrimination.

The administration's regulations acknowledge (albeit inadequately), that government funds cannot be used to support "inherently religious activities" or to discriminate against program beneficiaries. Why then should they want or need to discriminate on the basis of religion in hiring? We can think of no reason other than to press the envelope of permissible religious activities beyond the nebulous confines of the limitations contained in the proposed rules.

Conclusions That There are No Problems with Improper Funding are Unwarranted

In claiming success for the faith-based initiatives, proponents often report an increase of funding to religious organizations and a lack of reported legal challenges. The success of the initiatives, however, cannot be assumed when there is such limited

oversight of the participating organizations and limited information about where the money is going and how it is being spent.[5]

In the meantime, the administration continues to aggressively solicit participation of religious organizations in government programs. A recent *Washington Post* article reported that grants to religious groups now top $1.1 billion, including a sharp rise in FBOs receiving federal funding for the first time. The director of the White House Office of Faith-Based and Community Initiatives described this as a result of leveling the playing field, claiming success for the initiative. The article noted, however, that while the White House report provides the total amount distributed in grants to faith-based groups in 2003, important data such as how large an increase that represents over previous years has not been divulged: "The White House said various agencies awarded from 2 percent (Labor) to 24 percent (HUD) of all their grants to faith-based groups in fiscal 2003. But it did not provide similar percentages for previous years." The problem, of course, is not that federal money is going to religious entities, but that the rules have been changed and that money is going without constitutional protections in place.

[5] See "Charitable Choice: Federal Guidance on Statutory Provisions Could Improve Consistency of Implementation," United States General Accounting Office, Report to Congressional Requesters, September 2002. State and local officials cited in the GAO report expressed different understandings about charitable choice safeguards in place, for example, to protect the religious liberty rights of program participants. Officials in the states covered by the GAO report claimed they received few complaints from clients receiving services from faith-based organizations. However, the report also stated that the actual incidence of safeguard violations were unknown.